

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No 315 of 2001
(Old No. 2128 of 1985)

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| <p>1. Raj Kumar @ Raju
S/o Hansh Raj
R/o Ward No. 2, P.S.Khatima,
District Nainital.</p> <p>2. Pushpendra Singh
S/o Mahendra Pal Singh
R/o Ward No. 2, P.S. Sitarganj,
District Nainital.</p> <p>3. Swadesh Chandra @ Gappu
S/o Raj Bishan Lal Bhatnagar,
R/o Ward No. 9, P.S. Khatima,
District Nainital</p> <p>4. Nirankar
S/o Dr. Bal Ram Singh Chauhan,
R/o Bhur, Police Station Khatima,
District Nainital.</p> | <p>..... Appellant</p> <p style="text-align: center;">Versus</p> <p>The State</p> <p>..... Respondent</p> |
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Ms. Rajendra Kotiyal, learned counsel for the appellants.
Mr. Rajeev Mohan Birkhani, Brief Holder for the State.

Hon'ble Prafuall C. Pant, J.

This criminal appeal, preferred under Section 374(2) of the Code of Criminal Procedure, 1973 (for brevity hereinafter Cr.P.C.), is directed against the judgment and order dated 09.08.1985, passed by learned II Additional Sessions Judge, Nainital, in Sessions Trial No. 14 of 1983, whereby appellants Raj Kumar @ Raju, Pushpendra, Swadesh Chandra @ Gappu and Nirankar have been convicted under Section 396 of the Indian Penal Code,

1860 (for brevity hereinafter I.P.C.), and each one of the appellants has been sentenced by the trial court rigorous imprisonment for a period of ten years and fine of Rs. 2,000/-, in default of payment of which, the appellants shall further undergo rigorous imprisonment for one year.

2) Heard learned counsel for the parties and perused the entire record.

3) Prosecution story, in brief, is that on 24.09.1982, when P.W. 1 Tilak Raj (informant) came to his house in Khatima, at about 12:30 P.M., for lunch, he saw appellants Raj Kumar @ Raju, Pushpendra, Swadesh Chandra @ Gappu and Nirankar, dragging the dead body of his wife Kamlesh Kumar, from kitchen. Smt. Kamlesh Kumari (deceased) was lying in a pool of blood. P.W. 1 Tilak Raj made attempts to apprehend the appellants, but appellant Pushpendra pushed him aside and they all fled from the scene of occurrence. According to the prosecution, appellants Raj Kumar @ Raju, Swadesh Chandra @ Gappu and Nirankar were armed with knives. While fleeing from the scene of occurrence, appellants took the looted property from the house of complainant (Tilak Raj). On raising alarm by Tilak Raj, witnesses P.W. 3 Purshottam Lal, P.W. 5 Prem Kumar, P.W. 6 Rajendra Kumar and others saw the miscreants running away from the house of Tilak Raj. The First Information Report (Ext. A01) was lodged by P.W. 1 Tilak Raj with police station Kotwali Khatima, on the same day i.e. 24.09.1982, at about 1:10 P.M., against all the four accused persons. The police registered a case crime No. 179 of 1982, and investigation was done by P.W. 12

Station Officer A.P.S. Verma, Police took the dead body of the deceased in its possession and prepared inquest report (Ext. A –14), on the very day i.e. 24.09.1982. A sketch of the dead body (Ext. A –15) police form No. 13 (Ext. A –16), letter to the Chief Medical Officer (Ext. A –17), requesting him to get the autopsy done, were also prepared on the same day. The dead body was sent for postmortem examination. P.W. 11 Dr. J.K. Goel conducted the postmortem examination on the next day i.e. 25.09.1982 and prepared postmortem report (Ext. A –20). The Medical Officer opined that cause of death was shock and he due to the ante mortem injuries. The Investigating Officer, after inspecting the spot and preparing the site plan (Ext. A –18) made attempts to apprehend the named accused (appellants). During investigation all the four accused were arrested and the looted case property was recovered from them. Relating to the stolen articles recovered on 25.09.1982 from appellant Pushpendra, recovery memo (Ext. A –3) was prepared. Relating to the stolen articles recovered from appellant Raj Kumar @ Raju, recovery memo (Ext. A –6) was prepared. Relating to the stolen articles recovered from appellant Nirankar, recovery memo (Ext. A –7) was prepared. Relating to the stolen articles recovered on 26.09.1982 from appellant Swadesh Chandra @ Gappu, recovery memo (Ext. A –12), was prepared. Knives used in the crime were also recovered by the Investigating Officer. Recovery Memos, Ext. A –8), Ext. A –9) and Ext. A –13, relating to the knife used in the crime and recovered from appellants Raj Kumar @ Raju, Nirankar and Swadesh

Chandra, respectively, were also prepared by the police. The site plans (Ext. A-19, Ext. A –21, Ext. A –22 and Ext. A –23) were prepared relating to the places of recovery. On completion of the investigation, the Investigating Officer submitted charge sheet (Ext. A –25) against all the four accused (appellants) and two others for their trial, in respect of offences allegedly committed by them punishable under Section 396 and 412 of I.P.C. (Charge sheet was also filed against two more accused, namely Mohan Lal and Balram Singh, who were acquitted of the charges framed against them by the trial court).

4) On receipt of the charge sheet, it appears that the Magistrate concerned, after giving necessary copies to the accused persons, as required under Section 207 of the Cr.P.C., committed the case to the court of Sessions, for trial. Learned II Additional Sessions Judge to whom this trial appears to have been transferred by the Sessions Judge, Nainital. After hearing the prosecution and the defence, framed charge of offences punishable under Section 396, 412 and 120-B of the I.P.C. against accused / appellant Swadesh Chandra @ Gappu, Pushpendra, Raj Kumar @ Raju and Nirankar. All the four accused pleaded not guilty and claimed to be tried. (Accused Mohan Lal and Balram Singh were also charged but they were acquitted of the charges framed against them). On this prosecution got examined P.W. 1 Tilak Raj (informant); P.W. 2 Subhash Chandra (witness of recovery of stolen property); P.W. 3 Purshottam Lal (a chance witness); P.W. 4 Mullak Raj (a witness of recovery of some stolen articles and also of the recovery of the knives used in the crime);

P.W. 5 Prem Kumar; P.W. 6 Rajendra Kumar (both witnesses of the fact that they saw accused / appellants running out of the house of Tilak Raj, at 12:30 P.M.); P.W. 7 Kishan Lal (witness of conspiracy); P.W. 8 Constable Naresh Bahadur Singh (who took the dead body for postmortem examination and also a witness of preparation of inquest report); P.W. 9 Sub Inspector Ram Dayal Semwal (who initially started the investigation and prepared the inquest report); P.W. 10 Constable Chaku Singh (filed affidavit); P.W. 11 Dr. J.K. Goel (who conducted the postmortem examination on the dead body of the deceased); P.W. 12 Police Inspector A.P.S. Verma (who concluded the investigation) and P.W. 13 Head Constable Prem Shankar Sharma (who prepared the check report Ext. A -27 of the F.I.R. and made entry in the general diary). All the documentary and oral evidence was put to the accused persons, with regard to which they alleged that the same is false and it is further alleged by them that they were implicated falsely in the crime, due to enmity. Two witnesses D.W. 1 Dr. H.C. Joshi and D.W. 2 Laxmi Datt were examined in defence. Learned trial court, after hearing the parities, found accused / appellants Raj Kumar @ Raju, Pushpendra, Swadesh Chandra @ Gappu and Nirankar guilty of the offence punishable under Section 396 of I.P.C. and after hearing on sentence, sentenced each of the appellants, as mentioned earlier. However, they were acquitted of the remaining charges of the offence punishable under Section 412 and 120-B of I.P.C., framed against them. Other two accused were also acquitted of the charges. Aggrieved by said judgment and order dated

09.08.1985, the convicts preferred this appeal before Allahabad High Court in the year 1985, from where the same is received by this Court by way of transfer, under Section 35 of the U.P. Re-organization Act, 2000, for its disposal.

5) Before further discussions, it is pertinent to mention her, the ante mortem injuries found on the person of Kamlesh Kumari (deceased), at the time of postmortem by Dr. J.K. Goel, which are recorded in (Ext. A –20), and are reproduced hereunder:

- (i) Multiple incised wound (five in number) in a area of 10 cm, each 2.5 cm X 5 cm in size on right side front of abdomen upper part.***
- (ii) Two incised wounds each 3 cm X 0.5 cm, 3 cm apart on upper part of right waist bone.***
- (iii) Incised wound 2.5 cm X 1 cm on outer side, on right buttock middle.***
- (iv) Incised wound 3 cm X 1 cm on right side of back of abdomen lower part.***
- (v) Incised wound 3 cm X 0.5 cm on back and lower part of right side of abdomen 4 cm inner to injury No. 4.***
- (vi) Incised wound 1.5 cm X. 0.5 cm on right side on front of chest lower part.***
- (vii) Incised wound 5 cm X 15 cm on left side front of abdomen 4 cm from umbilicus at 4 O' clock position.***

- (viii) Two incised wounds each 2 cm X 0.5 cm in size, 1 cm apart on left side front of abdomen, 3 cm above injury No. 6.**
- (ix) Incised wound 2.5 cm X 0.5 cm in front of abdomen 5 cm above umbilicus at 1 O' clock position.**
- (x) Incised wound 3 cm X 0.5 cm on front side of right side of abdomen, 1 cm from the umbilicus at 9 O'clock position.**
- (xi) Incised wound 1 cm X 0.5 cm on right side of front abdomen lower part, 3 cm above the pubic bone.**
- (xii) Incised wound 3 cm X 1 cm on outer side of left thigh upper part.**
- (xiii) Incised wound 3 cm X 1 cm on front of left side of chest 8 cm from nipple at 2 O'clock position.**
- (xiv) Incised wound 2.5 cm X 1 cm on back and lower part of left forearm, 6 cm above the wrist.**
- (xv) Incised wound 4 cm X 1 cm on outer side of left wrist.**
- (xvi) Incised wound 3 cm X 7 cm on base and back of left middle finger.**
- (xvii) Incised wound 2.5 cm X 0.5 cm on front and lower part of left forearm, 8 cm above the wrist.**
- (xviii) Incised wound 3 cm X 1 cm on back and upper part of right buttock.**

6) Now, it is also pertinent to mention here, what stolen property was recovered from whom. List of thirteen stolen articles (Ext. A-2) is attached with the First Information Report (Ext. A –1).

Articles mentioned in recovery memo (Ext. A –3) discloses the recovery of following stolen articles from the possession of accused / appellant Pushpendra, which were recovered at his instance on 25.09.1982:

- i) One pair of gold ear rings.
- ii) A silver key ring.
- iii) One pair of silver anklet (Paajeb)
- iv) A silver chain

Articles mentioned in recovery memo (Extg. A –6) discloses the recovery of following four stolen articles from the possession of accused / appellant Raj Kumar @ Raju, Recovered at his instance:

- i) A gold earring
- ii) A silver ring.
- iii) A silver chain
- iv) Three silver Bichchua

Recovery memo (Ext. A –12) discloses the recovery of following two articles from the possession of accused / appellant Swadesh Chandra @ Gappu, which were recovered at his instance on 26.09.1982:

- i) One gold earring.
- ii) A silver chain (Mangalsutra).

7) Recovery memos Ext. A –8, Ext. A –9 and Ext. A –13 show that three knives, one knife at the instance of each of the accused appellants, Raj Kumar @ Raju, Nirankar and

Swadesh Chandra @ Gappu, were recovered during the investigation. Chemical Examiners report Ext. A –32 and Ext. A –33 were obtained on the blood stained articles including knives.

8) P.W. 1 Tilak Raj (informat) has stated on oath that on 24.09.1982, like everyday, his children had gone to school and his wife was alone in the house, when at about 12:30 P.M., he came from his shop in his house, for lunch, he saw that accused / appellants Raj Kumar @ Raju, Pushpendra, Swadesh Chandra @ Gappu and Nirankar were dragging his wife towards the kitchen. The witness further states that he tried to apprehend them but accused / appellant Pushpendra pushed him aside and he along with three others, namely Raj Kumar @ Raju, Swadesh Chandra @ Gappu and Nirankar, who were armed with knives, fled away. P.W. 1 Tilak Raj has further stated that accused / appellant Pushpendra was holding a bundle in his hands. The witness further narrated that the knives in the hands of accused were stained with blood. He further states that he raised alarm, on seeing his wife lying in a pool of blood, on which witnesses Prem Kumar, Subhash Chandra, Mullak Raj, Purshottam Lal and Rajendra Kumar came there. P.W. 1 Tilak Raj (informant) has further stated that almirahs of his house were lying open and all his belongings were scattered here and there in the house. These witnesses also saw accused persons going out. The witness lastly stated in the examination-in-chief that he got lodged the First Information Report (Ext. A –1) with the police.

9) P.W. 5 Prem Kumar and P.W. 6 Rajendra Kumar have corroborated the prosecution story to the extent that on hearing the alarm for help from the house of informant, when they reached towards it, they saw accused persons running away from his house, with knives and the bundle, in their hands.

10) P.W. 3 Purshottam Lal, who was passing through the house of Tilak Raj, half an hour before the incident, states that he saw accused / appellants going inside the house of Tilak Raj. Though, this witness is a chance witness, but his testimony can be seen to corroborate the statement of other witnesses of the same locality. P.W. 2 Subhash Chandra is the witness of recovery of the stolen articles recovered from the accused / appellants.

11) Mr. Rajendra Kotiyal, learned counsel for the appellants argued that the witnesses are residents of different wards of the locality and their should not be believed. The statement of P.W. 5 Prem Kumar and P.W. 6 Rajendra Kumar show that they belong to the same Ward, in which the house of P.W. 1 Tilak Raj is situate. P.W. 5 Prem Kumar states that his house is in front of the house of Tilak Raj. P.W. 6 Rajendra Kumar states that his house is in the north of the house of Tilak Raj, in the neighbourhood.

12) P.W. 4 Mullak Raj, resident of a different Ward, is not an eyewitness, but he is witness of the fact that the Police collected the broken glass, bangles etc., near the

kitchen form the floor and memo thereof (Ext. –10) was prepared by the police, in his presence.

13) Next argument advanced on behalf of the appellants is that the known persons would not have committed such a crime without concealing their identity. I see little force in the contention advanced on behalf of the appellants, in the present facts of the case. Here, in the present case, it is clear that the time chosen by the robbers was such that they knew that after the children of the housewife are gone to school and her husband gone to his shop, the lady used to stay all alone in her house. If she is killed, and dacoity is committed, there is no question of being identified by anyone in the house. In such circumstances, the dare devil act on the part of the accused / appellants cannot be said to be unnatural.

14) It is also submitted by learned counsel for the appellants that the injuries found on the person of the deceased indicate that the sharp edged weapon by which the deceased was injured was a double edged weapon, while the knives recovered, according to the Investigating Officer, was sharp edged from one side. This Court on examination of the evidence, found little force in the submission for the reason that there is nothing on the record, which indicates that either sides of the knives recovered from the accused / appellants were so thick, which could have created irregular margins in the incised wounds, inflicted on the person of the deceased.

15) For the reasons as discussed above, after going through the entire evidence on record, I am in agreement with the learned trial court that charge of offence punishable under Section 396 of I.P.C. is fully proved against all the four accused / appellants. I also feel, that the punishment awarded by the trial court is too lenient, in the present facts and circumstances of the case. (In commission of dacoity said to have been committed by five persons by the witnesses the charge could be proved against only four). As such, this appeal filed by the convicts (appellants) is liable to be dismissed. Accordingly, the same is dismissed. Conviction and sentence awarded by the trial court is maintained. All the four accused appellants are on bail. Their bail is cancelled. The trial court shall take them into custody, immediately to make them serve out the sentence, awarded against them.

(Prafulla C. Pant, J.)

Dt. October 16, 2006
H.Negi